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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 679.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

WILLIAM W. TUCKER, HENRY MILLIKEN, SAMUEL B. DANA, JOHN B. BALDWIN, JR., AND ARTHUR AMORY, PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF UPHAM, TUCKER & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1874.

Oct. 2, 1874

Rec'd

SUPREME COURT OF THE UNITED STATES.

No. 679.

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vs.

WILLIAM W. TUCKER, HENRY MILLIKEN, SAMUEL B. DANA, JOHN B. BALDWIN, JR., AND ARTHUR AMORY, PARTNERS, DOING BUSINESS UNDER THE NAME AND STYLE OF UPHAM, TUCKER & CO.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between William W. Tucker, of Boston, in said district, Henry Milliken, of Longwood, in said district, Samuel B. Dana, of the city, county, and State of New York, John B. Baldwin, jr., of said Boston, and Arthur Amory, of said New York, copartners doing business in said Boston under the name and style of Upham, Tucker & Company, plaintiffs, and Charles W. Slack, of Boston, in said district of Massachusetts, as he is collector of the internal revenue of the United States within and for the third collection-district of Massachusetts, defendant, in an action of contract a manifest error hath happened, to the great damage of the said Charles W. Slack, collector as aforesaid, as by his complaint appears;

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by

JOHN LOWELL,
District Judge.

2 Circuit court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now here the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of the said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of October, A. D. 1874.

[SEAL.]

JOHN G. STETSON,
Clerk.

Defendants in error hereby acknowledge due and sufficient service of the foregoing writ of error and of a citation thereon, entitling said writ of error to be entered in said Supreme Court of the United States at the October term, A. D. 1874.

HILLARD, HYDE & DICKINSON,
For Defendants in Error.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-three,

Before the honorable George F. Shepley, circuit judge.

WILLIAM W. TUCKER, OF BOSTON, COUNTY OF Suffolk, and Commonwealth of Massachusetts; Henry Milliken, of Longwood, county of Norfolk and Commonwealth aforesaid; Samuel B. Dana, of the city, county, and State of New York; John B. Baldwin, jr., of said Bos-
4 ton, and Arthur Amory, of said New York, copartners, doing business in said Boston under the name and style of Upham, Tucker & Co., plaintiffs,

v.

CHARLES W. SLACK, OF BOSTON, IN SAID county of Suffolk, as he is collector of internal revenue for the third internal-revenue district of Massachusetts, defendant.

} In an action of contract.

And the plaintiffs say the defendant owes them eight thousand nine hundred and eighty dollars and eighty-eight cents ($8,980.88) for money received by the defendant to the plaintiffs' use, to the damage of the said plaintiffs (as they say) the sum of fifteen thousand dollars.

5 The writ in this cause is dated the twenty-second day of September, A. D. 1873, and is made returnable before the justices of the superior court of the commonwealth of Massachusetts then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of October, A. D. 1873. This cause after entry in said superior court was removed to this circuit court by writ of certiorari, issued upon the petition of said defendant, dated the fourteenth day of October, A. D. 1873, and made returnable before this circuit court at the October term thereof, A. D. 1873. This cause is duly entered here at the present term, when and where the parties appear by their respective counsel, and on the fourth day of December, A. D. 1873, it is agreed by said counsel that either party may amend his pleadings at any time before judgment. Thereupon, by leave of court, on said fourth day of December, A. D. 1873, the following amended declaration and
6 answer are filed, namely:

Amended declaration.

And the plaintiffs say that the assessor of internal-revenue of the United States for the third collection district of Massachusetts on or about the several dates and times mentioned in the account hereunto annexed, marked A, assessed upon the plaintiffs an internal-revenue tax purporting to be a tax of one dollar per thousand upon plaintiffs' gross sales of merchandise, to wit, dry goods, as wholesale

dealers, during a period extending from March 1, 1869, to August 31, 1870, both dates inclusive, in excess of fifty thousand dollars a year; and that afterwards on or about the several dates and times mentioned in said accounts annexed, to avoid the distraint and
7 seizure of the property of the plaintiffs by said Collector Slack, who had power by law thus to enforce payment of said tax, said plaintiffs paid the several amounts of said tax to said Collector Slack under protest; and that thereafterwards, to wit, on or about the 22d day of June, 1872, the plaintiffs duly appealed to the Commissioner of Internal Revenue against the assessment and collection of the tax aforesaid, as having been erroneously and illegally assessed and collected; and claimed that, by reason of such erroneous assessment and collection of said several sums, the plaintiffs were justly entitled to have the same refunded, and asked and demanded the same, all in accordance with the provisions of law in that behalf made and provided, and with the regulations of the Secretary of the Treasury of the United States
8 established in pursuance thereof; that afterwards, to wit, on or about the 7th day of August, 1873, the then Commissioner of Internal Revenue of the United States published to plaintiffs his decision on their said appeal, refusing to allow the refunding of said several sums, or any of them, or any part of either of them, to the plaintiffs. And the plaintiffs aver that, up to the day of the date of this writ, the said several sums, or any of them, or any part of either of them, have and has not been refunded to the plaintiffs, and the plaintiffs' claim for the refunding of the same has not been allowed; and they further aver that said excess of sales above $50,000 a year was not liable to tax, and that said assessment and tax and the collection thereof was wholly
9 illegal and void, and that the plaintiffs are entitled to recover the same back from said Slack, and that the said Slack now owes the same to the plaintiffs, and interest thereon from the several dates of payment.

Account annexed. A.

Dates of assessment.	Amounts assessed.	On sale during—	Dates of payment.
10 April, 1869	127 83	March, 1869	30 April, 1869.
	6 39	Penalty @ 5 per cent. for	delaying payment.
10 May, 1869	75 43	April, 1869	31 May, 1869
10 June, 1869	114 99	May, 1869	30 June, 1869.
10 July, 1869	74 60	June, 1869	31 July, 1869.
	3 73	Penalty at 5 per cent. for	delaying payment.
10 Aug., 1869	67 42	July, 1869	30 Aug., 1869.
10 Sept., 1869	99 91	Aug., 1869	30 Sept., 1869.
10 Oct., 1869	96 55	Sept., 1869	30 Oct., 1869.
	4 83	Penalty at 5 per cent. for	delaying payment.
10 Nov., 1869	136 02	Oct., 1869	30 Nov., 1869.
10 Dec., 1869	134 84	Nov., 1869	31 Dec., 1869.
10 Jan., 1870	67 08	Dec., 1869	31 Jan., 1870.
10 Feb., 1870	79 22	Jany., 1870	28 Feb., 1870.
10 Mch., 1870	77 93	Feb., 1870	31 M'ch, 1870.
10 April, 1870	69 06	March, 1870	30 April, 1870.
10 May, 1870	78 52	April, 1870	31 May, 1870.
10 June, 1870	37 36	May, 1870	30 June, 1870.
10 July, 1870	23 47	June, 1870	30 July, 1870.
10 Aug., 1870	56 92	July, 1870	31 Aug., 1870.
10 Sept., 1870	93 47	Aug., 1870	23 Sept., 1870.
	50 00	Special tax as wholesale	dealers, 10 June, 1869.
	1,575 57		

10 2nd count. And the plaintiffs say the defendant owes them the sum of $1,575.57, according to the account annexed, marked "B."

Account annexed.—B.

Charles W. Slack, U. S. collector, to Upham, Tucker & Co., Dr.

30 April, 1869	To amt. of tax on sale for	March, '69	127 83
31 May, '69	"	April, '69	75 43
30 June, '69	"	May, '69	114 99
31 July, '69	"	June, '69	74 60
30 Aug., '69	"	July, '69	67 42
30 Sept., '69	"	Aug., '69	99 91
30 Oct., '69	"	Sept., '69	96 55
30 Nov., '69	"	Oct., '69	136 02
31 Dec., '69	"	Nov., '69	134 84
31 Jan., '70	"	Dec., '69	67 08
28 Feb., '70	"	Jan., '70	79 22
31 Mar., '70	"	Feb., '70	77 93
30 April, '70	"	Mar., '70	69 06
31 May, '70	"	April, '70	78 52
30 June, '70	"	May, '70	37 36
11 30 July, 1870	"	June, '70	23 47
31 Aug., '70	"	July, '70	56 92
23 Sept., '70	"	Aug., '70	93 47
	" special tax as wholesale dealers		50 00
30 Apr., '69	" 5 per cent. penalty for delay in payment		6 39
31 July, '69	" do.	do.	3 73
30 Oct., '69	" do.	do.	4 83
			A1,575 57

And the plaintiffs claim interest upon said several payments from the several dates of payment.

3rd count. And the plaintiffs say the defendant owes them $1,575.57, for money had and received, according to the account hereunto annexed, marked "B," and interest upon the several items from the date of payment.

Answer.

And now comes the defendant in the above-entitled suit, and
12 makes answer to the plaintiffs' writ and declaration.

The said defendant denies each and every allegation in the said plaintiffs' writ and declaration, and in each count thereof.

CHARLES W. SLACK,
By his attorney, GEO. P. SANGER,
U. S. Attorney.

And on said fourth day of December, A. D. 1873, the following stipulation is filed, namely:

Stipulation.

It is hereby stipulated by the parties that the above-entitled cause may be tried by the court without the intervention of a jury, with the rights of parties protected, as provided in the act of March 3, 1865, sec. 4.

HENRY D. HYDE,
Atty. for Plffs.
GEO. P. SANGER,
U. S. Atty., Atty. for Deft.

13 This cause thereupon, to wit, Dec. 4, 1873, came on to be tried by the court, before the honorable George F. Shepley, circuit judge, and the honorable John Lowell, district judge, and was fully tried. On the twentieth day of March, A. D. 1874, the opinion of the court is filed, and it is thereupon, to wit, March 26, 1874, considered by the court that the said William W. Tucker, Henry Milliken, Samuel B. Dana, John B. Baldwin, jr., and Arthur Amory, copartners under the name and style of Upham, Tucker & Co., plaintiffs, recover of said Charles W. Slack, as he is collector of internal revenue for the third internal-revenue district of Massachusetts, defendant, the sum of one thousand nine hundred and seventy-nine dollars and twenty-seven cents, and their costs of suit, taxed at .

A true record. Attest:

JOHN G. STETSON, *Clerk.*

14 Upon the trial of said cause, after the evidence was closed on both sides, and before entry of judgment, the said Charles W. Slack, defendant, filed his bill of exceptions, which was sealed and allowed by the court, and is in the words and figures following, namely:

15 Circuit court of the United States, district of Massachusetts.

Defendant's exceptions.

WILLIAM W. TUCKER ET AL.
v.
CHARLES W. SLACK, COLLECTOR OF INTERNAL revenue.

This was an action of contract against the defendant, a collector of internal revenue, to recover the sum of $1,575.57 and interest, which had been assessed upon and collected of the plaintiffs, as an internal-revenue tax upon them, as wholesale dealers, under the act of June 30, 1864, § 79, (13 Stat., 251,) as amended by the act of July 13, 1866, (14 Stat., 115.) The writ was dated September 22d, 1873, and the case was entered in the State court, and was brought by certiorari to this court. No question was made by the plaintiffs, but that the assessment and collection of the tax were in due form, if upon the facts hereinafter stated they were liable to pay any tax as
16 wholesale dealers, and the defendant admitted that the plaintiffs had made due application to the commissioner for the refunding of the tax, and that the application had been refused and the suit brought in due time. It was also agreed that if, upon the facts, the court should decide that the plaintiffs were not liable to the tax as wholesale dealers, but were liable to a tax of one-half the amount as commercial brokers, under the act of June 30, 1864, § 79, clause 14, (13 Stat., 253,) as amended by the act of July 13, 1866, (14 Stat., 115 and 134, near the end,) judgment should be rendered in their favor for half the amount claimed and interest, subject to the defendant's exceptions.

The cause was heard by the court, (Justices Shepley and Lowell,) without a jury, upon a stipulation filed in accordance with the act of March 3, 1865, § 4, (13 Stat., 501.)

The witnesses produced by the plaintiffs, so far as their testimony was material to the issue, in their direct and cross examination,
17 testified substantially as follows, and their testimony was uncontradicted.

The Nashua Manufacturing Company and the Jackson Manufacturing Company were manufacturing corporations, chartered under the laws of the State of New Hampshire, and having their place of manufacture at Nashua, in that State. The Boston Manufacturing Company and the Lancaster Mills were similar corporations, chartered under the laws of Massachusetts, the former having its place of manufacture at Waltham, Massachusetts, and the latter its place of manufacture in Clinton, in the same State. These corporations, during the whole period that the tax in question was assessed upon the plaintiffs, were engaged in the manufacture of cotton goods. They were severally managed by a board of directors, who were substantially the same persons, and who, under the respective by-laws, had the management and control of the affairs
18 of the several corporations. The only officers mentioned specifically in the by-laws, in addition to the directors, were a president, who must be one of the directors, and a treasurer, and a clerk. The directors had full authority to hire, appoint, and contract with any servants and agents necessary to transact the business of the corporation. These four corporations had the same office in Boston, each corporation paying its proportional share of the rent and expenses. They elected the same person as treasurer, and another person as clerk, to the four corporations. In this office the directors of all the corporations held their meetings and transacted their business, and their records were there kept. All the meetings of the corporations were held at this office, and the records kept there, except such meetings as were required to be held in the State where the corporations were chartered. The clerk of the corporations was also at this office. This office was
19 likewise the office of the treasurer, who was paid a separate salary by each corporation, and who, under the by-laws of each corporation, and, in fact, was its chief executive officer, buying all the raw material and making the other purchases for the corporation, taking care of their finances, and, under the board of directors, managing and controlling the affairs of the corporation, their agents, and servants.

Between these corporations respectively and the plaintiffs, who were a mercantile firm, transacting business in Boston, under the name of Upham, Tucker & Co., there were separate agreements, either in writing or by parol, that the plaintiffs should sell all the goods manufactured by each corporation, for a fixed percentage on the amount of sales, and the course of business of the plaintiffs under and in pursuance of these agreements was as follows: They, (the plaintiffs,) had a store in Boston, which they hired in their own names, and for which they paid the rent, with clerks, book-keepers, and other servants
20 whom they employed and paid. In this store was a counting-room, in which their business was transacted, and chambers where samples of goods manufactured by the corporations were kept. No goods except sample bales and packages were there kept, unless occasionally some goods which had been missent, or for some reason had not been accepted by a customer, found their way there.

The plaintiffs were known to be the agents of these corporations, to sell their goods, and they sold only the goods of these corporations, and their course of business was as follows: They were kept informed daily of what was manufactured at the several mills, and made sales to purchasers as opportunity offered. They kept in their office a different set of books for each of the corporations, and when a sale of any of the goods of any of the corporations was effected, an entry of the
21 fact was made in the books of that corporation, and they notified the manufacturing agent at the mill of such corporation, (where

all the goods were stored as they were manufactured, and this was the case with each corporation,) to send such goods to the purchaser. The goods were then packed at the mill, and directed to the purchaser, and forwarded to Boston by rail, where a truckman, employed and paid by the plaintiffs, received them, and delivered them to the purchaser, if in Boston, or at the steamboat-landing or railroad-station, if the goods were to be sent elsewhere. The freight by rail, from the mill to Boston, was paid by the plaintiffs, and was, with the expense of truckage, charged by them to the respective corporations. When sufficient time had elapsed after the sale for the delivery of the goods, the plaintiffs sent to the purchaser a bill of the goods in their own names, separate bills being rendered for the goods of each corporation, and not as
22 agents, and in due course, when they were settled, receipted the bills in their own names, and not as agents. When the bills were paid in cash, the money was received by the plaintiffs and deposited in bank in their own names; and if on any given day money was received from sales of the goods of the different corporations, such money was mingled together and deposited by the plaintiffs in their own names. If the bills were settled by notes, the notes were made payable either to the order of the makers, and by them endorsed, or to the order of the particular corporation whose goods were sold. The plaintiffs did not put their names upon any such notes, nor did they guarantee any of their sales. They delivered these notes from time to time to the treasurer, and from time to time paid him money, and every month settled their account with each corporation.

The plaintiffs had a branch house in New York, and an agency in Philadelphia, and the sales in New York and Philadelphia
23 were reported to the Boston house and deliveries and collections were made as to such sales in the same manner as in sales at the Boston house. Such sales were not included in their returns to the assessor at Boston, and no part of the taxes which this action is brought to recover were paid upon such sales at New York and Philadelphia.

The witnesses also testified that when the plaintiffs handed in their monthly lists of sales, they did so under protest.

The plaintiffs called as a witness one of their firm who paid all the taxes in person, and they also called the deputy collector who received the taxes. On the direct examination, the partner paying the taxes testified that they were all paid under protest, but on the cross-examination he testified that he filed a general protest upon the payment of the first tax, which was understood by him and the deputy col-
24 lector should apply to all subsequent payments, and, thinking that this covered all subsequent payments, he could not remember as to each particular tax, whether it was paid under a special protest, but presumed it was.

The deputy collector testified that he received the written protest, with the understanding that it should apply to subsequent payments, and that when he received the subsequent payments he so understood it, but he had no recollection one way or the other as to special protests at the time of subsequent payments. It also appeared that the several corporations had paid the manufacturer's tax of five per cent. upon all their goods that were sold by the plaintiffs.

When the plaintiff's testimony was closed, the attorney for the defendant moved the court to direct that the plaintiffs should be non-suit, as, upon this testimony, admitting it all to be true, it appeared, 1st, that the plaintiffs were wholesale dealers within the meaning of
25 the law, and so liable to pay the tax that was collected of them;

2d, that the sales made by the plaintiffs were not sales made by the manufacturing corporations within the meaning of the law; and, 3d, if the sales were made as agents of such manufacturing corporations within the meaning of the law, they were not made at the place of manufacture, nor at the principal office or place of business of such corporations, but were made at the store of Upham, Tucker & Co., and also because the protest was insufficient. Arguments were made upon this motion, and the court reserved its decision, it being agreed that if the motion of the defendant was overruled, judgment should be entered for the plaintiffs for the full amount claimed, with interest, or for half the amount claimed with interest, if the court should find that the plaintiffs were liable to a tax as commercial brokers, saving all
26 exceptions to the defendant. The court, after consideration, overruled the motion for non-suit, and ordered judgment to be entered for the plaintiffs for the full amount claimed. To all which rulings and orders of the court the defendant excepts, and prays that his exceptions may be allowed, and inasmuch as the matters herein before set forth do not appear in the record, the same have been reduced to writing, and, being found to be correct, this bill of exceptions is allowed by the court and directed to be filed as of March 26, 1874, before entry of judgment.

G. F. SHEPLEY, [L. S.]
U. S. Circuit Judge, First Judicial Circuit.
JOHN LOWELL, [L. S.]
District Judge.

27 The following is the opinion of the court, in accordance with which judgment was entered in said cause on the twenty-sixth day of March, A. D. 1874, namely:

Circuit court of the United States, district of Massachusetts.

October term, A. D. 1873, to wit, March 26, 1874.

W. W. TUCKER ET AL. }
v. }
C. W. SLACK. }

Before Shepley & Lowell, JJ.

Opinion of the court.

LOWELL, J. This case was tried before us without a jury, and we find the facts to be as follows: The plaintiffs were the selling-agents of four manufacturing companies, and sold all the goods of those companies, either by themselves at Boston, by their house in New York, or by their subagents in Philadelphia. All the sales passed through the books of the Boston house, and their place of business was the principal one for sales. They kept no separate bank accounts for the different companies, but deposited the cash to their own credit, paying over from time to time as requested, and making a full settlement monthly. But separate sets of books were kept for each company, through which every sale could be distinctly identified; and when the paymenis were made in the notes of their customers, they were made either to the
28 order of the treasurer whose goods they represented, or if the customer preferred it to his own order, and were in all cases handed

over to the treasurer. Notes were never made to the order of the plaintiffs, nor were sales guaranteed by them. Their agency was known to all their customers.

The plaintiffs kept only samples at their place of business, and the goods sold were delivered from the factory of the company on the plaintiffs' order. Goods occasionally found their way to the plaintiffs' place of business, but only when they had been missent, or for some other reason had not been accepted by a customer.

Each of the companies for which the plaintiffs were selling-agents had an office or counting-room separate from that of the plaintiffs, and in a different part of the city of Boston, at which the treasurer of the company transacted all the financial business. The treasurer was the superior officer, and was the person to whom the plaintiffs rendered their accounts, and from whom they were bound to take instructions.

The plaintiffs were assessed monthly, as wholesale dealers, for the excess of their sales above $50,000, under the statute of June 30, 1864, sect. 79, 13 Stat., 251, a samended by the statute of July 13, 1866, 14 Stat., 115, and paid under protest the several sums sought to be recovered in this action. Appeal was taken from the assessment, and was decided by Secretary of the Treasury against the plaintiffs.

Upon this state of facts, we decide the plaintiffs are entitled to recover the several sums demanded by them, for the following reasons:

The sales were made by the plaintiffs, as agents of the several manufacturing corporations, and were made in such mode and under such circumstances, that it is clear an action could have been maintained by or against the several corporations, directly upon the contract of sale. They were sales for a disclosed domestic principal, and were made by samples; the agents not having, so far as appears, any possession or any
29 special property whatever in the goods. That they were the sales of the companies, is further shown by the well-known and proper course of the officers of the revenue, in assessing all these sales as the sales of the manufacturers. No question was made that the companies had returned all their sales, and paid the much more considerable tax upon them of five per cent. ad valorem, so long as that tax remained assessable by law. The statute declares that nothing contained in it shall require a special tax for the sale by manufacturers of their own goods, wares, and merchandise at the place of production or manufacture, and at their principal office or place of business; provided no goods, wares, or merchandise shall be kept, except as samples, at said office or place of business. (Section 74 as amended, 14 Stat., 113.)

It was argued that the office of the treasurer was the principal office of the company; and this appears to be so, if the statute refers to the office where the highest officer of the company transacted business; but our opinion is, that whatever the meaning of the word office, "place of business" in this section means the principal place for sales of goods. This is the subject-matter of the section. It was of no importance to the Government whether the treasurer of the company had an office in the same building with the selling-agent, or that the course of affairs might require different places for different parts of the company's business; what they were legislating about was the special tax on manufacturers, and they intended that the payment of the special tax by manufacturers should authorize them to make sales at their factory, and at one other and principal place of selling, whether the office or not. This view of the case is confirmed by the provisions of section 82 of the principal act, a section which was not changed by the act of 1866,

and which requires all manufacturers to furnish to the assistant assessor a statement, subscribed and sworn to, or affirmed, setting forth
30 the place where the manufacture is to be carried on, the principal place of business for sales, the name of the manufactured article, etc. (13 Stat., 258.) One purpose of this return was to enable the assessor to check the monthly account of sales, on which the large duty of five per cent. was payable; but it was part of the purpose, in all probability, to obtain a definite statement of the place of business, at which the manufacturer considered himself entitled to sell, under the seventy-fifth section, as his principal place, without further payment of a special tax.

We see very little reason to doubt that the words "office" and "place of business" are used disjunctively, and that a manufacturer might elect at which of them he would sell; and in this connection it may be noted that the seventy-fourth section, as it stood in the act of 1864, was in this form: "Nothing herein contained shall prohibit the storage of goods, wares, or merchandise, in other places than the place of business, nor the sale, by manufacture's or producers, of their own goods, wares, or merchandise, at the place of production or manufacture, or at their principal office or place of business; provided no goods, wares, or merchandise shall be kept for sale at such office." (13 Stats., 249.) As amended, the section reads, as we have seen, that nothing shall be held to require a special tax of manufacturers selling at their factory, and at their principal office or place of business; provided no goods shall be kept except as samples at such office or place of business.

We do not mean to say that the meaning is different, but it is much more clearly expressed in the amended form, that manufacturers may sell at two places, if they please, namely, at the factory, and at their principal office or place of business; but at that office or place of business, whichever it may be called, or whichever it in fact be, they must sell by sample.

31 If this interpretation be wrong, the law is not uniform, because the liability to this additional tax would depend on accidental circumstances, such as whether the manufacturer kept his accounts and transacted his financial business in one place or another. It would often be very difficult to say which was the principal place of business, if we are to compare the importance of different parts of the business. We know of no reason why selling is not as important an object with manufacturers as any other part of their business. But if the license is to sell at the factory, and at one other principal place of business, used for that purpose, there is no difficulty.

For these reasons, we are of opinion that neither the manufacturing companies nor their agents, the plaintiffs, were liable to pay a special tax, as wholesale dealers, in respect to these sales.

Judgment for plaintiffs.

33 UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of William W. Tucker et al. v. Charles W. Slack in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston in said district this sixteenth day of Octo-

ber, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] JOHN G. STETSON, *Clerk.*

(Indorsement on cover:) No. 679. Massachusetts. C. C. U. S. Charles W. Slack, collector of internal revenue, plaintiff in error, vs. William W. Tucker, Henry Milliken, Samuel B. Dana, John B. Baldwin, jr., and Authur Amory, partners, doing business under the name and style of Upham, Tucker & Co. Filed 20th October, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

CHARLES W. SLACK, *Collector, &c.*,
vs.
TUCKER *et als.*
} No. 679.

In Error to the Circuit Court of the United States for the District of Massachusetts, October Term, 1873.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

CHARLES W. SLACK, *Collector, &c.*,
vs.
TUCKER *et als.*
No. 679.

In Error to the Circuit Court of the United States for the District of Massachusetts, October Term, 1873.

BRIEF FOR THE UNITED STATES.

This was an action of contract against the collector to recover $1,575 57, an internal-revenue tax that had been collected from the plaintiffs below as *wholesale dealers*, under the act of June 30, 1864, section 79, (13 Stat., 251,) as amended by the act of July 13, 1866, (14 Stat., 115.)

The business in question was done by the plaintiffs below, in Boston, as agents of four companies, which manufactured cotton, respectively, at Nashua, in New Hampshire, and at Waltham and Clinton, in Massachusetts. The companies were managed by boards of directors, composed substantially of the *same* persons, and they had the *same* office in Boston, and the *same* treasurer. The directors held their meetings, transacted their business, and kept their records in the Boston office, which was also the office of their treasurer, who was the chief executive officer of each corporation, buying raw material for them, &c.

The defendants in error were a mercantile firm of Boston, known as Upham, Tucker & Co., and, under separate agreements with the corporations, sold all the goods manufactured by each, for a fixed percentage on the amount of sales, their course of business being as follows: They occupied a storehouse which, with their clerks, &c., they hired in their own names; in the storehouse was a counting-room in which their business was transacted, and chambers for samples of goods, &c., manufactured by the corporations. The plaintiffs were known as agents of the corporations, *and sold only their goods*, such goods, whenever sales were made by the agents, being, upon order by them, transmitted to the purchasers by the corporations *from their respective places of production. Cash payments* for such goods were made to the agents, who deposited the same in bank to their own credit, without making any distinction between that which was received for one or another of the principals. *Other payments* were made by notes, payable either to the order of their makers, who endorsed them, or to the order of the particular corporation whose goods were sold. The plaintiffs did not put their names upon such notes, or *guaranty* sales. They delivered the notes, from time to time, to the treasurer, and every month settled their accounts with each corporation.

The plaintiffs also carried on the same business, in the same way, at a branch house in New York, and at an agency in Philadelphia, but these latter transactions are not included in this suit.

It was shown that when the plaintiffs returned to the tax assessor their monthly list of sales, they did so under protest. It was also shown that the partner who

paid the taxes filed a general protest upon the payment of the first tax, which was understood by him and the deputy collector, who received them, to apply to all subsequent payments, but the partner, who was witness for the firm, could not remember, as to any particular tax, whether it was paid under protest, *but presumed that it was.*

No evidence was introduced for the collector, and on his behalf a motion was made to the court below to non-suit the plaintiffs, because—

1st. Such plaintiffs were *wholesale dealers* within the meaning of the law, and, so, liable to the tax.

2d. That the sales in question were not made by the manufacturing corporations within the meaning of the law.

3d. If the sales were made as agents, they were not made at the place of manufacture, nor at the principal office or place of business of such corporations.

4th. Because the protest was insufficient.

The court, on consideration, overruled the motion, and ordered judgment to be entered for the plaintiffs.

We assign for error the rulings of the court upon the first and fourth points above stated.

I.

We submit that Upham, Tucker & Co. were *wholesale dealers.*

The revenue law in question, (1866, ch. 184, sec. 9, 14 Stat., 115,) after laying upon *wholesale dealers* a tax of fifty dollars, if their annual sales do not exceed fifty thousand dollars, and also a tax of one dollar on each

additional thousand in excess of fifty thousand dollars, gives the following definition: "Every person shall be regarded as a *wholesale dealer*, whose business it is, for himself or on commission, to sell or offer to sell any goods, wares, or merchandise, of foreign or domestic production, not including wines, spirits, or malt liquors, whose annual sales exceed twenty-five thousand dollars."

By the record, it appears that Upham, Tucker & Co. were persons whose sole business it was, for a commission, to sell goods, as agents, for certain manufacturers, and who sold such goods to an amount beyond twenty-five thousand dollars (*i. e.*, to an amount of about $1,000,000) per annum.

Therefore, if there were nothing more to affect this question than the statutory provision above quoted, the defendants in error were clearly *wholesale dealers*, and liable to the tax collected.

II.

It is said, however, on behalf of the defendants in error, that, *inasmuch as the commissions which they received were received in their character as agents of* MANUFACTURERS, whose "principal place of business" (at least for selling) is also the place of business of such agents, therefore they are not liable for the tax—by virtue of the italicised portion of the following provision in the same statute:

"That the receipt for the payment of any special tax shall contain and set forth the purpose, trade, business, or profession for which such tax is paid and the name and place of abode of the person or persons paying the same, &c.; the time for which payment is made; the

date or time of payment; and (except in case of auctioneers, &c.,) the place at which the trade, business, or profession for which the tax is paid shall be carried on: *Provided*, That the payment of the special tax herein imposed shall not exempt from an additional special tax the person or persons, (except lawyers, physicians, &c.,) or firm, company, or corporation doing business in any other place than that stated; *but nothing herein contained shall require a special tax* for the storage of goods, wares, or merchandise in other places than the place of business, nor *for the sale by manufacturers or producers of their own goods, wares, and merchandise at the place of production or manufacture and at their principal office or place of business;* provided no goods, wares, or merchandise shall be kept, except as samples, at said office or place of business." (14 Stat., 113.)

Upon consideration of the above provision, in connection with that first above quoted, the proposition on the part of the firm seems to be that parties (*wholesale dealers*) can avoid the payment of a tax which by a particular section is expressly laid upon them, provided they can show that, by some other section, *other* parties to the same transaction ("manufacturers") are excused from its payment!

It will probably be admitted that if Upham, Tucker & Co. had carried on their commission business for any other principals than *manufacturers*, they would be subject to the tax.

There appears to be no reason why they should not as well pay a tax upon business given them by *manufacturers*, as upon business from any other quarter.

In distributing its burdens, the internal-revenue law pays little or no attention to the theory that certain parties, when taxed, can, for all practical purposes, *shift their burden* upon somebody else.

That the United States has laid a tax upon sales by *manufacturers*, and has provided, further, that this (suppose) shall be the *only tax upon such persons*, has no pertinency as an objection to a tax levied upon *other parties on account of their relation* to the same sales. This latter tax is no tax upon the *manufacturers*.

III.

But the irrelevancy of the above statutory provision to the purpose for which it is cited, appears more clearly from a closer view of it, especially in connection with what immediately follows in the same section.

We submit here that the provision relied upon by the defendants in error does not refer to special taxes upon the amount of business done in certain trades, &c., *but only to special taxes paid by such trades for license;*— that the section provides, for instance, that where *merchants*, &c., do business at more than one place, they shall pay for more than one license, whereas *lawyers*, &c., shall, in such case, pay for but one; and, again, that such *manufacturers* as sell at their *place of business* as well as at their *place of production* shall pay only for one.

In the act of 1864, which the above section amends, the word was *license*. (13 Stat., 249, sec. 74.) Although the phrase *special tax* may sometimes mean more than license tax, (see 14 Stat., 115, &c.,) yet here both *the reason of the thing* and *the context* show plainly that the former is used as synonymous with the latter:

1. *The reason of the thing*: For, while there is reason for not requiring of a manufacturer a double license tax in such cases, there is none for not requiring of him

any special tax upon the amount of goods sold at each place. Indeed, the five per cent. tax (14 Stat., 131, paragraph 3d from bottom) is no "special tax," and in the above passage the phrase must apply to the *ten-dollar tax or to nothing!*

2. *The context*: For the section proceeds, after the words above quoted, as follows:

"Every person exercising, &c., any trade, &c., for which a special tax is imposed, shall, on demand of any officer, &c., exhibit the receipt for the payment of the tax, and unless he shall do so, &c. And all such special taxes shall become due on the first day of May in each year, *or* on commencing any trade, &c. In the former case the tax shall be reckoned for one year, and in the latter case, proportionately for that part," &c.

We leave this language to speak for itself, with the remark that, of course, it refers to some tax payable *before* the business in question is entered upon.

In conclusion, we repeat that, as there is nothing improper in imposing a double tax upon a transaction which has a double aspect, (*ex. gr.*, as here, a tax upon both the principal and the agent in a sale,) a statute which applies to *one* party to such transaction does not thereby cover *another*, (rather the contrary.) Here, however, the statutory provision has no application, *even to the manufacturer*, as party to the sale, except so far as it requires that he shall have been *licensed* What per cent. he or they shall pay upon the amount of sales is left to other parts of the statute.

IV.

We also submit that the reason for requiring a *protest* before allowing suits to be brought against a tax

collector, shows that a prospective protest, agreed to by a deputy of such collector, as in this case, is invalid. The deputy is no agent of the collector as to transactions *in futuro*. No *special* authority is shown in the present case to affect his principal beyond the ordinary course of dealing in collection of taxes.

GEO. H. WILLIAMS,
Attorney General.

S. F. PHILLIPS,
Solicitor General.

Supreme Court of the United States.

No. 679.

CHARLES W. SLACK,

(Collector of Internal Revenue),

Plaintiff in Error,

vs.

WILLIAM W. TUCKER, *et als.*

DEFENDANTS' BRIEF.

WRIGHT & POTTER, Printers, 79 Milk Street (corner of Federal), Boston.

Supreme Court of the United States.

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WRIGHT & POTTER, Printers, 79 Milk Street (corner of Federal), Boston.

CHARLES W. SLACK, COLLECTOR, ETC.

Plaintiff in Error,

VS.

WILLIAM W. TUCKER, ET ALS.

DEFENDANTS' BRIEF.

The tax sought to be recovered was assessed monthly upon the defendants, as wholesale dealers, for their excess of sales above $50,000, under the Act of June 30, 1864, section 79, 13 Stat. 251, as amended by the Act of July 13, 1866, 14 Stat. 115.

The Act of June 30, 1864, provides as follows: "Wholesale dealers, whose annual sales do not exceed fifty thousand dollars, shall pay fifty dollars for each license; and if exceeding fifty thousand dollars, for every additional thousand dollars in excess of fifty thousand dollars, one dollar. Every person shall be regarded as a wholesale dealer under this Act whose business it is to sell, or offer to sell, any goods, wares or merchandise of foreign or domestic production, not including wines, spirits or malt liquors, whose annual sales exceed twenty-five thousand dollars."

The Act of July 13, 1866, 14 Stat. 115, provides as follows: "Wholesale dealers, whose annual sales do not exceed fifty thousand dollars, shall pay fifty dollars; and if their annual sales exceed fifty thousand dollars, for every additional thousand dollars in excess of fifty thousand dollars, they shall pay one dollar; and the amount of all sales within the year beyond fifty thousand dollars shall be returned monthly to the assistant assessor, and the tax on sales in excess of fifty thousand dollars shall be assessed by the assessors and paid monthly as other monthly taxes are assessed and paid. Every person shall be regarded as a wholesale dealer whose

business it is, for himself or on commission, to sell, or offer to sell, any goods, wares or merchandise of foreign or domestic production, not including wines, spirits or malt liquors, whose annual sales exceed twenty-five thousand dollars."

Section 74 of the Act of June 30, 1864, 13 Stat. 249, relates to licenses, and provides: "But nothing herein contained shall prohibit the storage of goods, wares or merchandise in other places than the place of business, nor the sale by manufacturers or producers of their own goods, wares and merchandise at the place of production or manufacture, or at their principal office or place of business, provided no goods, wares and merchandise shall be kept for sale at such office."

Section 74, as amended by the Act of July 13, 1866, 14 Stat. 113, provides: "But nothing herein contained shall require a special tax for the storage of goods, wares or merchandise in other places than the place of business, nor for the sale by manufacturers or producers of their own goods, wares and merchandise at the place of production or manufacture, and at their principal office or place of business, provided no goods, wares or merchandise shall be kept except as samples at said office or place of business."

Section 94, of the Act of June 30, 1864, 13 Stat. 269, provides that there shall be paid "on cloth and all textile or knitted or felted fabrics of cotton . . . a duty of five per centum *ad valorem*," and the same rate of duty is made payable by the Act of July 13, 1866, 14 Stat. 131.

It is plain that Congress intended that manufacturers should pay a tax upon their production, and then should have a right to sell, or make contracts to sell, the same without paying an additional tax upon their sales, provided they should sell at the place of production or manufacture, or at their principal office or place of business. The restrictions upon the latter place were in the Act of 1864, "provided no goods, wares and merchandise shall be kept for sale at such office," and in the Act of 1866, "provided no goods, wares and merchandise shall be kept except as samples at said office or place of business."

A corporation can only act through agents; and the defendants were the agents of the several corporations for selling their goods. That they were such agents appears from their course of dealing and from the admitted fact that "there were separate agreements, either in writing or by parol, that the defendants should sell *all* the goods manufactured by each corporation for a fixed percentage on the amount of sales." The ownership or possession of the goods never passed from the several corporations to the defendants. The transactions of each corporation were kept on separate books; separate bills of the goods of each corporation when sold were rendered; all expenses of transportation were paid by the respective corporations; and all notes taken for the payment of goods sold were the property of each corporation, and were delivered to its treasurer. The defendants "were known to be the agents of these corporations to sell their goods." An action could have been maintained by or against the several corporations upon the contract of sale.

If the defendants were the agents of the respective corporations for selling their goods, were the goods sold at such a place that no tax could be assessed upon the sales? It is admitted that only samples were kept at the place of sale.

The defendants sold *all* the goods of each corporation; none were sold at the place of production or manufacture. The only place where their goods were sold, was the place where the defendants sold them. This place was, then, not only their principal office or place of business for selling, but it was their only office or place of business for that purpose.

The purpose of a corporation in manufacturing goods, is, that it may sell them, and thereby realize a profit. The goods are manufactured to sell, and, after they are manufactured, the principal business is to sell them. It is hardly fair to suppose that Congress intended to distinguish between the relative importance of the duties of the treasurer and selling agent of a corporation, but that the corporation having paid the tax upon its production should be allowed to sell its own goods, through its own agents, at the place of production or at its office or principal place of business for selling. This view of the law is sustained by section 82 of the Act of 1874, 13

Stat. 258, which was not changed by the Act of 1866, which provides that "Every person shall furnish, without previous demand therefor, to the assistant assessor, a statement, subscribed and sworn to, or affirmed, setting forth the place where the manufacture is to be carried on and the principal place of *business for sales*."

It may be claimed that the defendants sold goods in Boston, New York and Philadelphia, and that it does not appear which of the three was the principal place, or at which place the largest amount was sold. But it can hardly be supposed that Congress intended, that if a corporation manufactured goods in Maine, it should not have a right to sell them through their own agents at a recognized place of business in each of these cities upon the same terms; and that if it had an office and agent for selling in Boston, it could not have an additional office and agent for selling in New York, without paying in the latter place a tax of one dollar per thousand upon all its sales. In the present case, the goods upon which the tax was collected were all sold in Boston, and the Court found as a fact that "all sales passed through the books of the Boston house, and their place of business was the principal one for sales."

It is claimed that if the defendants were not required to pay the tax of one dollar per thousand on all sales made by them as wholesale dealers, they were liable to pay one-half of that amount as commercial brokers; this is admitted, if they were not exempt as previously shown. A wholesale dealer is a commission merchant who has possession of goods and sells them, one "whose business it is for *himself* or on commission to sell or offer for sale any goods," etc.

14 Stat. 117. "Commercial brokers shall pay twenty dollars. Any person or firm whose business it is, as a broker, to negotiate sales or purchases of goods, wares or merchandise, or to negotiate freights and other business for the owners of vessels or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded a commercial broker."

A commercial broker is one "whose business it is, as the *agent* of *others*, as a broker to negotiate sales or purchases of goods," etc. The defendants were only agents, and

never commission merchants; and if they were not the selling agents, they were only brokers negotiating sales for their principals, and should only have been taxed as such. The distinction between a wholesale dealer and a commercial broker is as marked and distinct as it is between a commission merchant and a broker.

14 Stat. 134, section 99, as amended, provides: "And there shall be paid monthly on all sales by commercial brokers of any goods, wares or merchandise, a tax of one-twentieth of one per centum upon the amount of such sales; and on or before the tenth day of each month every commercial broker shall make a list or return to the assistant assessor of the district, of the gross amount of such sales as aforesaid for the preceding month, in form and manner as may be prescribed by the commissioner of internal revenue."

The Court, hearing all the evidence in the case, and seeing the witnesses, found as a fact that the plaintiffs "paid under protest the several sums sought to be recovered."

The evidence upon the matter of protest was as follows:—

"On the direct examination, the partner paying the taxes testified that they were all paid under protest, but, on the cross-examination, he testified that he filed a general protest upon the payment of the first tax, which was understood by him and the deputy collector should apply to all subsequent payments; and thinking that this covered all subsequent payments, he could not remember as to each particular tax, whether it was paid under a special protest, but presumed it was. The deputy collector testified that he received the written protest, with the understanding that it should apply to subsequent payments, and that when he received the subsequent payments he so understood it, but he had no recollection one way or the other as to special protests at the time of subsequent payments."

The preponderance of evidence is, that *each* tax was paid under a special protest. The undisputed fact is, that when the first tax was paid, a general protest was filed, which it was understood by the plaintiff and the deputy collector, to whom

the payment was made, should apply to all subsequent payments, and such a protest is sufficient.

Wetter *vs.* Schell, 11 Blatch. 193.
Steegman *vs.* Maxwell, 3 Blatch. 365.
Hutton *vs.* Schell, 6 Blatch. 48.
Brune *vs.* Marriott, Taney's C. C. Decisions, 132.
Marriott *vs.* Brune, 9 Howard, 619.
Ullman *vs.* Murphy, 11 Blatch. 354.

No protest was necessary, it being "admitted that the plaintiffs had made due application to the commissioner for the refunding of the tax, and that the application had been refused and the suit brought in due time," the appeal under the internal revenue laws taking the place of the protest under the customs revenue laws. Sect. 19, Act of July 13, 1866, 14 Stat. 152, provides that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, and a decision of said commissioner shall be had thereon," etc.

Nichols *vs.* United States, 7 Wallace, 122.
United States *vs.* Black, 11 Blatch. 538.
Hendy *vs.* Soule, Deady's Rep. 400.
Coblens *vs.* Abel, 1 Woolworth's C. C. Rep. 293.

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